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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-68

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MAGGIE BAILEY, . . . . . Petitioner,

*versus*

COMMISSIONER OF INTERNAL REVENUE, . . . . . Respondent.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No. ———

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MAGGIE BAILEY, - - - - - *Petitioner,*

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COMMISSIONER OF INTERNAL REVENUE, - *Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

## OPINIONS BELOW.

The per curiam opinion of the Court of Appeals (Appendix A, infra, p. 33) is reported at 439 F. 2d 723 (1971). The opinion of the United States Tax Court is reported at 29 TCM 272 (1970).

## JURISDICTION.

The judgment of the Court of Appeals was entered on April 27, 1971 (Appendix A, *infra*, p. 34). Petition for Rehearing was denied May 28, 1971 (Appendix A, *infra*, p. 34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## QUESTIONS PRESENTED.

1. Where there was a county search warrant for the search of taxpayer's residential-business premises for alcoholic beverages in violation of state law but where the taxpayer was not present, not operating the business, and not served—but where the warrant was served on taxpayer's brother who was operating the business—and where three state highway troopers, at the end of their search for alcoholic beverages under the search warrant, discovered a large quantity of taxpayer's money (her lifetime savings) in a locked footlocker in a locked cabinet—and where the three state officers were then advised by telephone by the county judge who issued the search warrant to call the county attorney and where they were advised by the county attorney to leave the money alone as it was not covered by the search warrant—and where the three state troopers, having completed their search under the search warrant, then made an exploratory search for evidentiary materials by the seizure and count of the taxpayer's money, acting under claim and guise of the Federal authority of the Internal Revenue Service,

in the hope that evidence of a Federal income tax crime might be found—and which evidentiary materials with respect to the count and total of the money they took into custody and delivered to the Federal Internal Revenue Service—

Was there any reason to suspect or probable cause for the three state highway troopers to believe that the taxpayer was in violation of any Federal criminal income tax law?

And was not this an unreasonable search and seizure making the evidentiary materials inadmissible to establish the fraudulent intent by the taxpayer to evade taxes in a United States Tax Court civil, quasi-criminal income tax trial, where there was a timely objection by the taxpayer?

2. Where the Commissioner of Internal Revenue affirmatively alleged in its United States Tax Court pleadings that the taxpayer was guilty of fraudulent intent to evade income taxes and, as proof of this fraud, further affirmatively alleged that the taxpayer had an estimated $200,000 cash on hand at December 31, 1963—and where the estimated $200,000 was based on the alleged count on February 18, 1965 of $206,909 by three state troopers of money in taxpayer's footlocker in her residence during a raid on her residence for alcoholic beverages in violation of Kentucky law which raid was during taxpayer's absence—and where the taxpayer was not asked on direct examination during the Tax Court trial any question about the troopers' count of her money in the footlocker or how much money she had in the footlocker when the troopers

opened it or how much she counted from the footlocker when she returned home two days after the troopers' raid and after their alleged count of the money—but where the government questioned the taxpayer on cross-examination about the amount of money she had in the footlocker upon her return home and where she then testified that she had about $116,000—

Did this open the door for the evidence illegally seized by the state troopers and allow the testimony of the alleged count by the troopers and of the $206,909 they claimed they counted, over the timely objection of the taxpayer?

3. Assuming *arguendo* that the search and seizure of the taxpayer's money was made by the three state troopers under the authority of the county search warrant for alcoholic beverages—where, in the affidavit for the search warrant, the *first* of these three state troopers stated that he had *information* from a *civilian* that the *civilian* had made a purchase of *legal-taxed* alcoholic beverages from the taxpayer's business-residential premises in violation of State law—but where the testimony, in a United States Tax Court trial, by the *second* state trooper was that the *third* state trooper had made the purchase of the alcoholic beverages for the search warrant—and where the search warrant authorized a search and seizure of illegal *untaxed,* spirituous and intoxicating liquors, or illicit *stills*—

Was not the search warrant void, the search and seizure unreasonable, and the evidence inadmissible to establish the fraudulent intent by the taxpayer to evade taxes in a United States Tax Court civil, quasi-

criminal income tax trial, where there was a timely objection by the taxpayer?

4. Where a primary factual question in a Federal civil income tax trial was whether or not the taxpayer had $206,909 in cash on February 18, 1965—

Was not the record so devoid of evidentiary support as to render the decision unconstitutional under the Due Process clause of the Fifth Amendment?

## AMENDMENTS TO THE CONSTITUTION AND RULES OF CRIMINAL PROCEDURE INVOLVED.

The Constitutional Amendments involved are the Fourth and Fifth and are in Appendix B, *infra,* p. 35. Reference is made to Rule 41 of the Federal Rules of Criminal Procedure, in Appendix B, *infra,* pp. 35-36.

## STATEMENT.

The taxpayer-petitioner is a scantily educated, poorly lived woman, born in 1904 (R. 71a, 153a, 189a-193a, 219a, 229a-233a, 375a, 376a). She was reared on a farm in a remote and rugged mountain coal mine area of Kentucky (R. 190a, 192a, 193a). At the age of 16, she moved 25 miles and found work in the town of Harlan, Harlan County, also deep in the Kentucky coal-mine mountain area; where she has since continued to reside most of the time (R. 142a, 189a, 192a, 193a, 197a, 202a, 370a).

From July, 1945, through 1964 the taxpayer engaged in the business of selling legal taxed alcoholic beverages at her home, a semi-shack located in a sec-

tion of poor people at the outskirts of Harlan, which was dry territory (R. 154a, 177a, 186a, 189a, 202a, 205a, 206a, 371a). Kentucky statutes forbade the selling or having possession for sale of alcoholic beverages in a dry territory (R. 177a, 224a). The taxpayer however always had a Federal tax stamp to sell alcoholic beverages and operated a respectable place with never any disturbances (R. 182a, 202a, 203a, 285a).

During early January to mid-March 1965, the taxpayer did not operate the business, as she was in Louisville, Kentucky, attending her sister with terminal cancer (R. 224a, 225a, 250a, 252a, 253a, 261a). During this period, taxpayer's brother Tyree Davidson operated the business (R. 115a, 127a, 261a, 286a, 333a, 334a).

On February 18, 1965 for a search warrant of taxpayer's home, Kentucky state trooper George Mayberry made an affidavit before the Harlan County Judge that he had "information" from a "Charles Young" that he, Charles Young, had purchased taxed alcoholic beverages on February 17, 1965, at the residence of the taxpayer (R. 116a). Receiving trooper Mayberry's affidavit, the county judge issued a search warrant for "illegal liquor" which stated that a search could be made of the taxpayer or her premises for "untaxed" alcoholic beverages or "stills" (R. 114a, 115a). Under this warrant a raid on taxpayer's home was made on February 18, 1965, by nine state troopers with trooper James Cromer in charge (R. 125a, 126a, 127a, 261a, 320a, 351a). Since the taxpayer was not present operating the business but was in Louisville,

the search warrant was not served on her but on her brother, who was operating the business R. 115a, 224a, 225a, 261a, 281a, 282a, 285a, 286a, 333a).

At the end of their search of taxpayer's home for alcoholic beverages, trooper-in-charge James Cromer and troopers George Mayberry and Roy Lindsey found a locked home-made closet in her bedroom (R. 266a, 271a, 313a, 321a, 322a, 323a, 49, 50, 51). Upon forcing it open they found a padlocked footlocker (R. 131a, 266a, 322a, 353a). The taxpayer had the only key to the footlocker (R. 313a). Trooper Cromer had seen the footlocker on prior raids of the taxpayer's home, having made 24 such raids from July, 1957 until February 18, 1965 (R. 278a-280a, 300a).

The troopers smashed the padlock on the footlocker and found in it 4 or 5 sized 8 pound brown paper grocery bags and a small jewelry box which was also locked, an old sock or plastic bag and a 1948 newspaper (R. 131, 270a, 296a, 325a-329a, 337a). The troopers opened the paper bags, the sock and the old newspaper and smashed the lock on the small jewelry box and found in them United States paper money (R. 323a, 353a). Also in the footlocker was an American flag in a plastic bag and Army medals and ribbons of taxpayer's brother-in-law killed in World War II (R. 131a, 191a, 269a, 323a, 337a, 343a, 361a, 52). The troopers found however no alcoholic beverages in the footlocker (R. 269a, 323a, 324a, 52). The money in the footlocker was the taxpayer's lifetime savings plus savings of her sister and mother (R. 244a, 245a, 258a, 259a, 371a).

The warrant did not have a provision for the search and seizure of the money; but trooper Cromer was determined to carry it away (R. 114a, 131a, 266a, 272a). He did not as a rule seize and count money on such raids (R. 291a). Therefore, having completed the search and seizure under the search warrant for alcoholic beverages and realizing that there was no provision for the raid of the taxpayer's money and recognizing his limitations on seizure of the money, trooper Cromer telephoned the county judge, who had issued the search warrant, and told him he had found a very large quantity of money and asked for advice about seizure (R. 262a, 266a, 292a, 326a). The county judge would not pass judgment on the matter and referred Cromer to his official legal advisor, the county attorney (R. 266a, 284a). The county attorney advised trooper Cromer that the money was not covered by and had no connection with the search warrant for alcoholic beverages; and advised that there were no grounds for seizing it and to leave the money alone (R. 131a, 143a, 144a, 325a).

Since all authority under the search warrant for seizure of the money was then closed to trooper Cromer via the magistrate under whose authority he was acting, Cromer decided to go outside the scope of the authority of the search warrant and to seek Federal authority to seize the money (R. 266a, 284a). Trooper Cromer knew that the taxpayer had a Federal tax stamp to sell alcoholic beverages (R. 289a). He did not telephone or consult with a Federal alcohol tax agent but did telephone and consult with a local Fed-

eral Internal Revenue income tax agent, who advised that he could not authorize trooper Cromer to seize and carry away the money but this Federal agent did request Cromer to advise him the next day as to the total amount of the money (R. 131a, 266a, 267a, 284a, 285a, 325a, 168a, 172a). No further effort was made by trooper Cromer to carry the money away from taxpayer's residence (Entire Record).

When cross-examined as to why he reported the finding of the money to the Federal Internal Revenue Service, trooper Cromer said that he thought that the money was evidentiary material for a violation of Federal law, testifying as follows (R. 284a):

> "Q. Why did you report it to the Revenue Service?
>
> A. I felt the money was the direct result of the bootlegging business and therefore felt it was seizable and I was advised *not* to seize it. *I thought it was a violation of the Federal law.*" (Emphasis supplied.)

After his discussion with the local Federal Internal Revenue income tax agent, trooper Cromer announced that he was going to count the money (R. 325a, 326a). He did not ask for nor was he given permission to count the money (R. 324a). To the contrary, the taxpayer's brother Tyree Davidson protested any counting of the money and questioned the trooper's authority to pry into the taxpayer's personal things (R. 324a). In reply to the brother's questioning of his authority, trooper Cromer advised that he was counting the money for the Internal Revenue Service (R. 324a). Trooper Cromer

later repeated that he was counting the money for the Internal Revenue Service (R. 360a). That was the only evidence that the Federal Internal Revenue income tax agent instructed Cromer to explore for evidentiary materials for a Federal income tax violation and to seize and keep possession of the money long enough to count it (R. 324a, 325a, 360a).

With the aid of troopers Lindsey and Mayberry, trooper Cromer seized the money, had it removed from the footlocker, and placed on a table in taxpayer's living room (R. 266a, 267a, 268a, 324a, 51). Taxpayer's brother again asked trooper Cromer what right they had to count the money and Cromer replied again that they were counting it for the Internal Revenue (R. 325a). Thereupon the three troopers engaged in an alleged count of the money from the footlocker with troopers Mayberry and Lindsey doing the counting and with trooper Cromer making a tally of the count (R. 268a). The taxpayer's brother and a once-a-week woman housecleaner, being the only other persons present at taxpayer's home when the raid began, were allowed to remain in the room as observers during the alleged count (R. 132a, 268a). Since three troopers of the nine raiders had departed, the other three remaining troopers were stationed by trooper Cromer outside on the premises for the purpose of keeping civilians outside the house during the alleged money count (R. 132a, 272a).

At the time the count of the money began, the search for evidence of alcoholic beverage violations under Kentucky law had been completed and resulted in the

troopers' finding and seizure of legal taxed alcoholic beverages worth about $99.60 but they found no untaxed alcoholic beverages (R. 129a, 130a, 271a, 272a, 326a).

After engaging in their exploratory search for evidentiary materials for a Federal income tax violation and having possession of the money for about an hour and 45 minutes or two and one-half hours, the troopers released it, leaving it with the taxpayer's brother and departed taxpayer's home (R. 132a, 271a, 342a). Although trooper Cromer and the others carried away and delivered the alcoholic beverages to the Harlan County Judge, they did not carry away and deliver the money to any magistrate, State or Federal (R. 129a, 130a, 273a). However, trooper Cromer carried away the evidentiary materials which he had gathered in his exploratory search, which included the tally he made of the alleged money count by troopers Lindsey and Mayberry (R. 117a-122a, 131a, 133a, 273a). He did not leave a copy of the tally with the taxpayer's brother or advise him of the total of the money allegedly counted (R. 342a, 344a, 358a). The evidentiary materials, the tally or a copy of his official state report about the finding of the money were not delivered to the county judge by trooper Cromer (R. 114a, 115a, 129a, 130a, 292a).

The next day after the raid, February 19, the taxpayer's brother was charged in county court, not with possession of untaxed alcoholic beverages but with the illegal possession and sale of alcoholic beverages in a dry territory under Kentucky statutes and was fined

$50.00 and given a 30-day suspended jail sentence[1] (R. 126a, 128a).

The departure of trooper Cromer and the other troopers from taxpayer's home was at night on February 18 (R. 271a, 326a). The next morning on February 19 the Federal internal revenue income tax agent, with whom trooper Cromer had consulted during the raid went to trooper Cromer at his Post to secure the evidentiary materials as to the taxpayer's money and trooper Cromer furnished this Federal officer with all available information about the money (R. 133a). In the afternoon of February 19, another local Federal Internal Revenue agent requested trooper Cromer for surveillance of the taxpayer's home until a lien could be placed against the property (R. 133a). Surveillance was maintained of taxpayer's residence by the state trooper from 6 p.m. on February 19 until 8:20 a.m. on February 20, when Internal Revenue Service officers arrived at the residence (R. 133a). The troopers reported there was no activity noted at taxpayer's home, which could be interpreted as being connected with the money (R. 133a).

Further on February 19, the Federal Commissioner of Internal Revenue levied against the taxpayer a

[1]The woman housecleaner was the only person arrested. Having finished her day's work, she was sitting on a couch in taxpayer's living room when the state troopers arrived for their raid (R. 351a). Trooper Lindsey asked her to move from the couch to look under the cushions. Under her cushion was a revolver. In spite of her statement that it was not hers and that she did not know it was under the cushion and, in spite of the fact that she was not carrying the pistol, Trooper Lindsey placed her under arrest for carrying a concealed deadly weapon. She was forced to empty her apron pockets. She made bond the next day after a preliminary hearing and was bound over to the grand jury but the case never left the grand jury (R. 272a, 273a, 280a-282a, 335a, 336a, 352a, 357a).

jeopardy assessment of income tax of $429,528,25 and *fraud* penalty of $214,765.13 and interest of $21,758.84 due for 1963 only (R. 66a, 169). A Federal revenue income tax agent from Louisville was assigned in charge of the examination of the taxpayer and was given the details by his supervisor of the police raid on taxpayer's premises and the cash found in the raid (R. 66-71, 79, 88). This agent made his first trip to Harlan on February 25 accompanied by two special *fraud* agents, and thus began a most intensive net worth investigation by many Federal agents of the taxpayer's financial condition, her business operations for the years 1942 through 1963 and all matters pertaining to the search of taxpayer's home and the counting of the money (R. 70-73, 86, 88, 90, 91).

The evidentiary materials which Cromer had gathered during the exploratory search, including his tally of the alleged count, were made available early to the Federal agent assigned to examine the taxpayer (R. 117a-122a, 308a, 79).

The examining Federal agents not only consulted early with the state police but examined public records, examined court house real estate and mortgage records, examined tax assessors' records and contacted county sources and county officials (R. 72, 73). The agents made other trips to Harlan (R. 70, 91). Two revenue agents permanently stationed in Harlan assisted in the examination (R. 70, 90). All the Federal agents spent a total of 538 hours on their examination of the case (R. 86).

In 1941 the taxpayer plead guilty and was sentenced in Federal District Court at London, Kentucky, which was nearby Harlan, Kentucky, for possessing untaxed whiskey (moonshine); and after this experience she never again sold untaxed whiskey or moonshine[2] (R. 87a, 202a). Until the taxpayer, herself, brought forth the evidence at the Tax Court trial on April 23, 1969 of this conviction, the Commissioner of Internal Revenue and his income tax agents, in the instant case, had no knowledge of it (R. 306a). Her living expenses, during a period of her incarceration, were charged to her as income by the examining revenue agent (R. 19a, 306a).

As required by the Internal Revenue Code, the Commissioner on April 14, 1965 mailed a statutory notice to the taxpayer however this notice covered the years 1942 through 1963 and the income taxes therein were $101,630.40 and 50 per cent *fraud* penalties were $50,952.69 with other penalties of $17,808.85. (R. 13a, 15a). The statutory notice was based on a net worth computation of income, which in turn was based on a cash total of $206,909 which in turn was based on the tally by trooper Cromer, resulting from the alleged count made by troopers Lindsey and Mayberry on February 18, 1965 (R. 19a-21a, 79, 80). The Commissioner used an estimated total of $200,000 cash at December 31, 1963 (R. 21a, 79).

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[2]Trooper Cromer had consistently raided the taxpayer, having made 24 raids on the taxpayer from 1957 through February 18, 1965 and the instant record reveals no evidence of any violation of any Federal, including untaxed whiskey, law by the taxpayer during the years 1942 to February 18, 1965 (R. 76a, 77a, 278a-280a, 289a).

The taxpayer filed a petition in the United States Tax Count contesting the deficiencies in the statutory notice (R. 7a).

At sometime prior to the trial in the United States Tax Court held April 23 and 24, 1969, the original county affidavit and search warrant for the search of taxpayer's home on February 18 had disappeared from the Harlan County Judge's office (R. 179a, 180a, 262a).

At the start of the trial in the Tax Court, the taxpayer requested the rule (R. 134a). The Commissioner however insisted that his witnesses remain in the courtroom because he said it would be helpful if they heard the others testify (R. 135a). At the start of the trial, counsel for the taxpayer established by the Harlan County Clerk that the original affidavit and search warrant were not available in the records of Harlan County for production in the Tax Court trial (R. 179a, 180a, 262a). However, unknown to the state troopers and others[3] taxpayer's counsel had in his possession photostats of the original affidavit and search warrant issued on February 18, 1965 (R. 286a, 287a).

Neither the originals nor copies of the county affidavit and search warrant were produced and introduced at the trial in Tax Court by the Commissioner through his or any other witness (Entire Record).

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[3](R. 286a)
"Q. I'll ask you if this is a copy of the search warrant that you served?
"A. That's it.
"Mr. Bagby: We'd like to offer this into evidence as Petitioner's Exhibit.
"Mr. Feeley: Again I'd like Mr. Bagby to furnish me a copy of that.
"Mr. Bagby: Don't you have a copy of this?
"The Witness: No, sir, we don't make copies of them."

During the Tax Court trial, trooper Cromer, as a government witness, testified on direct that trooper Roy Lindsey made the purchase of alcoholic beverages on February 17, 1965 at taxpayer's home and that this purchase was the basis for the search warrant issued by the county judge on February 18 and basis for the search for alcoholic beverages on that date of taxpayer's home. Cromer's testimony was as follows (R. 261a):

> "A. The raid was initiated on a *search warrant obtained by Trooper Lindsey after a purchase of alcohol* had been made from those premises." (Emphasis supplied.)

Trooper Cromer's report to headquarters also read as follows (R. 131a):

> "* * * *The warrant was issued as a result of a purchase of alcoholic beverages made by Trooper Roy Lindsey.* Harlan County Judge Acey Cornett issued the warrant earlier on the day it was executed." (Emphasis supplied.)

Trooper Cromer in his official report to his state headquarters stated that he personally received the search warrant and that the raid began at approximately 4 p.m. (R. 125a-127a, 261a). He testified that he was in charge of the raid and that he was responsible for the detailed report of the raid and that it was he who decided to use nine men to swoop down swiftly though he anticipated no trouble and had never had any trouble on prior raids (R. 125a-133a, 262a, 276a, 285a, 326a, 333a). Trooper Cromer had been garri-

soned in Harlan all of his 8¾ years with the state police whereas troopers Lindsey and Mayberry were garrisoned 130 miles away in Richmond, Kentucky and were in Harlan on special detail (R. 127a, 260a, 261a, 288a).

On cross-examination, trooper Cromer was surprised when taxpayer's counsel confronted him with a photostat of the affidavit made by trooper Mayberry (R. 287a). Thereupon Cromer refused to recognize this affidavit and testified that he had no personal knowledge of it but that he knew there was one on file but he had never seen it (R. 287a). This affidavit by trooper Mayberry, as previously stated herein, was sworn to before the county judge, and stated that *Mayberry* had *"information"* from a *"Charles Young"* that he, Charles Young on February 17, 1965 had purchased alcoholic beverages at taxpayer's residence (R. 116a). Although trooper Cromer testified that he did not know "Charles Young" and that he was not acquainted with trooper Mayberry's signature yet he testified that the "George Mayberry" on the affidavit was *the trooper* George Mayberry (R. 287a, 288a). Both the search warrant and the Mayberry affidavit had the same date, and the blanks were in the same distinctive handwriting and both with the county judge's signature (R. 114a, 116a). The affidavit was introduced in evidence by taxpayer's counsel without objection by the Commissioner (R. 288a, 289a).

Just previously on cross-examination at the Tax Court trial, trooper Cromer had quickly and gladly recognized the search warrant and indicated an anxiety

to prove that he had legal authority for the raid on taxpayer's home (R. 286a). The warrant had been served by trooper Cromer on taxpayer's brother and Cromer had made the return of the search warrant to the county judge (R. 114a, 115a, 286a, 287a).

One of the determining issues in this net worth civil income tax trial was whether or not the taxpayer had $200,000 at the end of 1963 (R. 19a-21a, 79). The Commissioner's *only* evidence as to this $200,000 was the testimony of his witness, trooper Cromer, who testified, on direct examination, to the details of the count on February 18 and said that the grand total of money found and counted was $206,909 (R. 268a, 274a, 275a, 79).

At the very start of trooper Cromer's testimony about the count of the money, taxpayer's counsel made a timely and prompt objection to any evidence about the trooper's count of the money on the ground that such evidence was in violation of taxpayer's rights under the Constitution and not within the realm of the search warrant for alcoholic beverages (R. 267a, 268a).

As heretofore stated, the taxpayer's money in bills from her footlocker found by the troopers was in a small jewelry box (8″ x 12″ x 4″ deep), and in 4 or 5 sized 8 pound grocery bags, in an old sock (or cloth) (about 2 to 3″ round) and some in a 1948 newspaper (R. 270a, 296a, 327a, 337a, 339a). The bills in the small jewelry box were in packets or bundles lengthwise (not folded) with a rubber band around each (R. 296a, 297a, 327a, 328a, 330a, 354a). The bills from the grocery

bags were in folds, folded over in the center, and held tight with a rubber band (R. 329a, 330a). The bills from the sock (or cloth) were in rolls with each held tight by rubber bands (R. 337a, 341a).

The denominations of the bills in the packets, folds, and rolls were 1's, 5's, 10's and 20's (R. 331a, 346a, 355a). Each packet, fold and roll consisted of "mixed-up" bills totalling $100 (R. 273a-275a, 297a, 329a, 330a, 354a). That is, each packet, fold and roll consisted of bills totalling $100 not of one denomination but of "mixed-up" denominations of 1's, 5's, 10's and 20's (R. 299a-300a, 332a, 346a). The money was not systematically stacked with the same denominations within each packet, fold and roll; and like bills were not systematically stacked together within each packet.

Cromer testified that in his presence Troopers Mayberry and Lindsey counted bill by bill, every bill of the $206,909 of the rubber-fastened packets, folds and rolls of mixed-up bills of the 1's, 5's, 10's and 20's within two and one-half hours. This testimony on direct was as follows: (R. 268a, 269a, 271a)

> "A. They were sitting at the table observing the count.
>
> "Q. Did you observe all the money in the foot locker?
>
> "A. *I observed all that was counted.*" (Emphasis supplied.)
> (R.275a)
>
> "Q. Now you observed the counting. *Was every bill counted?*
>
> "A. It appeared to be as far as I could tell." (Emphasis supplied.)

However his testimony on cross-examination was as follows: (R. 297a, 298a)

> "Q. Did you observe them all the time they were doing this?
>
> "A. *Yes, sir, I sat there at the table and watched.*
>
> "Q. Did they take these bill by bill?
>
> "A. Well, it gets tiresome counting one particular way all the time, *but they counted each individual bill.*
>
> "Q. *Of the two hundred six thousand dollars?*
>
> "A. *Yes.*
>
> "Q. They didn't thumb through or just flip through and estimate?
>
> "A. No, they didn't estimate, to my knowledge now.
>
> "Q. But you're not sure of it?
>
> "A. No, what I saw them count they counted individually.
>
> "But you didn't see them count every bill?
>
> "A. Well, I think you can see the situation. *Now, I can't testify as to what they did.*" (Emphasis supplied.)

Trooper Cromer confessed, on cross-examination, that he could not swear to the accuracy of the alleged count by troopers Mayberry and Lindsey (R. 299a). Although obviously present at the courthouse during the first day of the Tax Court trial for the purpose of testifying, after trooper Mayberry's affidavit was produced by taxpayer's counsel, troopers Mayberry and Lindsey apparently departed, as they were never called as witnesses (R. 203a, 204a, 300a, 379a).

The taxpayer's brother and the woman housecleaner, who viewed the count, testified only as rebuttal witnesses that the counters Lindsey and Mayberry spent three-fourths to one hour in the count and that they did not remove the rubber bands from any of the packets, folds and rolls and that the troopers did not count the money bill by bill (R. 330a, 341a, 342a, 355a, 356a, 364a).

The taxpayer testified that she returned to Harlan on the night of February 20 and that the first thing she did was to make a careful count of the money in the footlocker and that there was $116,300 in cash, of which $100,300 belonged to her and $10,000 belonged to her sister and $6,000 to her mother (R. 225a, 242a-244a, 312a, 313a, 364a, 365a). She further testified that on December 31, 1963, she had cash on hand which was about $1,000 to $2,000 more or less than the $100,300 (R. 365a). The taxpayer had no checking, savings, or other bank accounts as she distrusted bank's after she lost some money from a bank closing in the 1930's but kept all her savings in cash at home (R. 239a, 310a, 315a). In 1944 she had savings in cash at home of $80,000 (R. 238a, 239a, 259a, 371a, 379a, 382a). Other than her cash savings, her only other worldly possessions, during the years 1945 to 1963, were the barest of clothes, an insignificant inventory of alcoholic beverages, plus nominal furniture most of which furniture was purchased in 1963, having owned none of any value until 1957 (R. 223a, 224a, 371a, 374a, 380a).

Not only was the taxpayer well thought of in her community of Harlan, Kentucky but she has a good reputation for truth and veracity R. 143a, 182a).

The taxpayer was never arrested for or charged with any criminal violation, State or Federal, as the result of the raid on February 18 (R. 126a, 128a, 289a). Further, the taxpayer was held not to be guilty of any civil income tax fraud in connection with any of the income tax years involved in the instant case (R. 388a, 389a).

The evidence of the seizure and count of the money, presented through the testimony of trooper Cromer and his tally, was allowed by the United States Tax Court and this was the sole basis for the Tax Court's holding that the taxpayer had $206,909 in the foot-locker on February 18, 1965 (R. 379a). The Court of Appeals for the Sixth Circuit affirmed the Tax Court decision by stating, without more, that the law was properly applied and that the Tax Court's factual determinations were supported by substantial evidence (Appendix A, *infra*, p. 33).

## REASONS FOR GRANTING THE WRIT.

1. The decision below is in conflict with the Fourth Amendment of the Constitution and with the exclusionary rule enunciated in *One Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246; *Elkins* v. *United States,* 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437; *Weeks* v. *United States,* 232 U. S. 383, 58 L. Ed. 652, 655, 34 S. Ct. 341; *Boyd* v.

*United States,* 116 U. S. 616, L. Ed. 746, 6 S. Ct. 524; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 64 L. Ed. 319, 40 S. Ct. 182; *Mapp* v. *Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684; *Jones* v. *United States,* 357 U. S. 493, 2 L. Ed. 2d 1514, 78 S. Ct. 1253; *Gouled* v. *United States,* 255 U. S. 298, 309-311, 65 L. Ed. 647, 41 S. Ct. 261; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 75 L. Ed. 374, 51 S. Ct. 153; *United States* v. *Lefkowitz,* 285 U. S. 464, 76 L. Ed. 882, 52 S. Ct. 420; *United States* v. *Jeffers,* 342 U. S. 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93; *Rios* v. *United States,* 364 U. S. 253, 261, 4 L. Ed. 2d 1688, 1693, 80 S. Ct. 1431; *Stoner* v. *California,* 376 U. S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889; *Agnello* v. *United States,* 269 U. S. 20, 70 L. Ed. 145, 46 S. Ct. 4.

In *One Plymouth Sedan* v. *Pennsylvania, supra,* certiorari was granted to consider the important question of whether the exclusionary rule enunciated in *Weeks* v. *United States, supra,* and *Mapp* v. *Ohio, supra,* applied in quasi-criminal forfeiture proceedings where there was conflict in both state and federal decisions. The Court said in this case:

> "As this Court has acknowledged, '(t)he leading case on the subject of search and seizure is Boyd v. United States. * * *.' Carroll v. United States, * * *. See Mapp v. Ohio, supra, * * *. Boyd v. United States * * *, itself was not a criminal case but was a proceeding by the United States to forfeit 35 cases of plate glass which had allegedly been imported without payment of the

customs duty. * * * The question before the Court in Boyd was whether the compulsory production of a man's private papers for their evidentiary use against him in a proceeding to forfeit his property for alleged fraud against the revenue laws constituted an unreasonable search and seizure within the meaning of the Fourth Amendment of the Constitution. In holding that the Fourth Amendment applied and barred such attempted seizure, Mr. Justice Bradley, for the Court stated:

> 'We are clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. * * * If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession, of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one . . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution . . . .' "

This Court further said in Plymouth:

> "Finally as Mr. Justice Bradley aptly pointed out in Boyd, a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. * * *"
>
> * * * * * * *
>
> "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. * * *"

Is it not true that—had an attempt been made to introduce the evidentiary materials, seized by the three state officers in the instant case, in a criminal trial of the taxpayer, they would have been inadmissible by reason of not only the Fourth Amendment but the Fifth Amendment as well—and that therefore there is a question here?

This Court in the *Elkins* case, *supra,* said:

> "We granted certiorari, 361 U .S. 810, 4 L. Ed. 58, 80 S. Ct. 61, to consider a question of importance in the administration of federal justice. The question is this: May articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers be introduced in evidence against a defendant over his timely objection in a federal criminal trial?"

This Court in the *Elkins* case further said:

> "To put the issue in historic perspective, the appropriate starting point must be *Weeks* v. *United States* * * *, decided in 1914. It was there that the Court established the rule which excludes in a federal criminal prosecution evidence obtained by federal agents in violation of the defendant's Fourth Amendment rights. The foundation for that decision was set out in forthright words:
>
> "'The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. * * *'"

In the *Jones* case, *supra,* this Court said that "it is settled doctrine that probable cause for belief that certain articles, subject to seizure, are in a dwelling cannot of itself justify a search without a warrant" (357 U. S. 493, 497). This Court said also (347 U. S. 493, 498)—

> "* * * Were Federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the

provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified."

The decision below is in conflict with the First Circuit in the case of *Rogers* v. *United States,* 97 F. 2d 691 (C.C.A. 1, 1938) and the Seventh Circuit in the case of *Knoll Association, Inc.* v. *Federal Trade Commission,* 397 F. 2d 530 (C.C.A. 7, 1968) and *United States* v. *Five Thousand Six Hundred Eight Dollars and Thirty Cents, etc.,* 326 F. 2d 359 (C.A. 7, 1964) and the Second Circuit Court case of *Pizzarello* v. *United States, et al.,* 408 F. 2d 579 (C.A. 2, 1969). See the First Circuit case of *Berkowitz* v. *United States* (C.A. 1, 1965) 340 F. 2d 168, and the Tenth Circuit Court case of *United States* v. *One 1941 Mercury Sedan,* 156 F. 2d 897.

See the cases of *Ex parte Jackson,* 263 F. 110 (D.C. Mont. 1920) appeal dismissed; *Andrews* v. *Jackson,* 267 F. 1022 (C.A. 9); *Tovar* v. *Jarecki,* 83 F. Supp. 47 (N.D. Ill. 1948), reversed on other grounds 173 F. 2d 449 (7th Cir. 1949); *Powell* v. *Zuckert,* 366 F. 2d 634 (D.C. Cir. 1966); *Schenck* v. *Ward,* D. C. Mass., 24 Supp. 776; *Hugo Romanelli,* 54 T.C. 1448.

The First Circuit Court in *Rogers* v. *United States, supra,* held that evidence from an illegal search was not admissible in a civil case by the Federal government to recover custom duties on liquors imported. The court, relying on *Silverthorne Lumber Company* v. *United States, supra,* held that where evidence is obtained by the government in violation of the Fourth Amendment, such renders a judgment in a civil case invalid.

The *Berkowitz* case, *supra*, was a civil action in libel for forfeiture of money allegedly intended for use in violation of revenue laws. The First Circuit Court held that the Federal government was not permitted to enforce a forfeiture under internal revenue laws where the money was discovered and seized through the violation of the taxpayer's constitutional rights.

The case of *United States* v. *Five Thousand Six Hundred Dollars and Thirty Cents, etc., supra*, was libel for forfeiture of money seized from persons allegedly operating a bookmaking business for failure to pay the special tax or registering with the internal revenue. The Seventh Circuit Court held that the proceeding, though technically a civil action, was of quasi-criminal nature and that the question was covered by the Fourth Amendment.

The Seventh Circuit case of *Knoll Associates, Inc.* v. *Federal Trade Commission, supra*, was a proceeding to review an order of Federal Trade Commission for the petitioner to cease and desist practicing violations of the Clayton Act. The unreasonable search and seizure by the theft of petitioner's documents violated the Fourth Amendment and their use as evidence was denied as it was held that the proceeding was quasi-criminal. The court said:

> "We hold that we have not only the power but the duty to apply constitutional restraints when pertinent to any proceeding of which we have jurisdiction, such as a statutory review of a federal Commission decisions."

In the Tenth Circuit Court the case of *United States* v. *One 1941 Mercury Sedan, supra,* was in a libel to forfeit for transporting untaxed whiskey. Where city traffic ordinances were violated and the defendants arrested and their car searched for Federal law violations, the Circuit Court said:

> "And inasmuch as the police officers were not undertaking to enforce any law of the city or state but solely to aid in the enforcement of Federal law, the search and seizure violated the Fourth and Fifth Amendments and therefore the evidence was properly suppressed."

2. The decision below is in conflict with the principles of this Court enunciated in *Agnello* v. *United States, supra,* and as was stated in *Walder* v. *United States,* 347 U. S. 62, 98 L. Ed. 503, 74 S. Ct. 354, there is presented a novel aspect of the scope of *Weeks* v. *United States, supra.* The Court said in Walder:

> "* * * The question which divided that court, and the sole issue here, is whether the defendant's assertion on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized in connection with the earlier proceeding. Because this question presents a novel aspect of the scope of the doctrine of *Weeks* v. *United States* * * *"

3. Assuming *arguendo* that the three state troopers made their search and seizure of taxpayer's money under the authority of the county search warrant, the

affidavit was insufficient for the issuance of the county search warrant since it was a void search warrant, the search and seizure was an unreasonable search . . . and was in conflict with the Fourth Amendment . . . and is contrary to *Grau* v. *United States,* 287 U. S. 123, 53 S. Ct. 38; *Byars* v. *United States,* 273 U. S. 28, 71 L. Ed. 520, 47 S. Ct. 248; *Nathanson* v. *United States,* 290 U. S. 41, and the Supreme Court cases cited in the question of unreasonable search and seizure.

This Court stated in the *Grau* case, *supra:*

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury * * *; and would lead a man of prudence and caution to believe that the offense has been committed. * * * Tested by these standards the affidavit was insufficient. * * *"
>
> * * * * * * *
>
> "While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made."

The search warrant was in conflict with Rule 41 of the Rules of Criminal Procedure and Kentucky law.[4]

4. The record reveals an obvious and exceptional showing of error and it was so devoid of evidentiary support of the ruling that the taxpayer had $206,909

[4]The Kentucky Court of Appeals has held that an affidavit for a valid search warrant which is based upon information obtained from others must disclose the names of the informant. *Brewer* v. *Commonwealth,* 234 S. W. 2d 956, 314 Ky. 269 and *Carroll* v. *Commonwealth,* 181 S. W. 2d 259, 297 Ky. 748.

in cash on February 18, 1965 that it is so in conflict with due process under the Constitution—that it presents a substantial question for the Court. *Graver Tank and Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 193 L. Ed. 672; *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275 88 L. Ed. 721, 64 S. Ct. 593; *District of Columbia* v. *Pace*, 320 U. S. 698, 88 L. Ed. 408, 64 S. Ct. 406; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 86 L. Ed. 1537, 62 S. Ct. 1179; *Baker* v. *Schofield*, 243 U. S. 114, 118, 61 L. Ed. 626, 630, 37 S. Ct. 333; *Thompson* v. *City of Louisville*, 362 U. S. 199.

## CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. BAGBY
1107 First National Building,
Lexington, Kentucky 40507
*Counsel for Petitioner*

July, 1971

## APPENDIX A.

### 1. OPINION OF THE COURT OF APPEALS.

No. 20,729

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

MAGGIE BAILEY,
*Petitioner-Appellant,*
*v.*
COMMISSIONER OF INTERNAL REVENUE,
*Respondent-Appellee.*

APPEAL from the Decision of the United States Tax Court.

Decided and Filed April 27, 1971.

Before: MCCREE, BROOKS and MILLER, Circuit Judges.

PER CURIAM. This appeal is from a decision of the Tax Court of the United States which determined a deficiency in the taxpayer's income for the years 1945 through 1963. The memorandum, findings of fact and opinion of law of the Tax Court are reported at P-H Memo T.C., par. 70,064. We have considered the record, the briefs of the parties and oral arguments of counsel, and conclude that the Tax Court's factual determinations are supported by substantial evidence and that the law was properly applied.

The decision of the Tax Court is affirmed.

## 2. JUDGMENT OF THE COURT OF APPEALS.

Filed April 27, 1971

Before: McCree, Brooks and Miller, Circuit Judges.

On appeal from the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.

It is further ordered that Respondent-Appellee recover from Petitioner-Appellant the costs on appeal, as itemized below.

Entered by order of the Court.
(s) Carl W. Reuss
Clerk

## 3. REHEARING DENIED BY COURT OF APPEALS.

Filed May 28, 1971

Before: McCree, Brooks and Miller, Circuit Judges.

The motion for rehearing filed by the petitioner-appellant, Maggie Bailey, has been considered and it is Ordered denied.

Entered by order of the Court
(s) Carl W. Reuss
Clerk

## APPENDIX B.

### AMENDMENTS INVOLVED.

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or Public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### RULES OF CRIMINAL PROCEDURE.

Rule 41. Search and Seizure

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that

they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

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No. 71-68

# In the Supreme Court of the United States

OCTOBER TERM, 1971

MAGGIE BAILEY, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-68

MAGGIE BAILEY, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Tax Court held that petitioner incorrectly reported federal income tax for the years in question, 1945 through 1963, during which she operated a retail liquor business in violation of a local prohibition against liquor sales (R. 370a–371a).[1] It determined deficiencies in petitioner's income tax for those years and additions to tax, but did not make additions to tax for fraud (R. 393a–394a).[2] The court of appeals affirmed *per curiam* (Pet. App. A, p. 33).

[1] "R." references are to the record appendix filed in this case in the court below.

[2] The Tax Court decision is unofficially reported at 29 CCH Tax Ct. Mem. 272.



442-618—71

Petitioner kept no records (R. 376a–377a), and hence the Commissioner employed the net worth-expenditure method of proof (R. 378a). The principal dispute at trial concerned the amount of cash that petitioner had on December 31, 1963, the closing net worth date.

The Commissioner's proof on this point was based on the testimony of a state trooper. He related that on February 18, 1965, he searched the petitioner's premises for illicit liquor, under the authority of a local warrant (R. 114a). The warrant was based on an affidavit stating that one Charles Young had purchased illicit liquor at the petitioner's residence one day before the search (R. 116a). During the search, the officers found a footlocker, opened it, and discovered a large amount of cash, which they counted to be $206,909 (R. 126a, 128a, 275a). They did not take any of the money from the premises. Petitioner objected to the state trooper's testimony (R. 267a–268a, 311a);[3] she claimed that she counted the money a day or so later and had only $116,300 (R. 312a). The Tax Court credited the trooper's testimony, and computed peti-

[3] In response to the court's inquiry concerning the basis for the objection, petitioner's counsel responded (R. 267a–268a):

"* * * We do object to the testimony on two grounds. One, that this is way beyond the period, this is 1965 he's testifying to, and secondly, we think this was a search and they haven't presented the search warrant or showed, they haven't showed yet that they had a search warrant for Mrs. Bailey. I'd like to see a copy of what he says they served. I think, Your Honor, this is not within the realm of a search warrant for alcoholic beverages, and I think the testimony should not be allowed. I don't know what the testimony is going to be, but I imagine it will be prejudicial."

tioner's tax liability based on a December 31, 1963 cash balance of $200,000.[1]

In this Court, petitioner contends that the trooper's testimony was inadmissible because the warrant was unsupported by probable cause and the search went beyond the description in the warrant, and that the court's decision denied her due process because the finding concerning the cash she had was "devoid of evidentiary support" (Pet. 5).

1. The warrant was based on probable cause. Officer Mayberry, on whose affidavit (R. 116a) the warrant was issued, stated that his information came from Charles Young, who, the affidavit indicated, actually purchased illicit liquor from Maggie Bailey's premises. The affidavit named the informant and included precise information about the time of his purchases and the amounts and kinds of liquor he had purchased. Although the affidavit contained no independent statement about the informant's reliability, such precise information producing such a clear certainty of criminal activity was sufficient to establish probable

[1] 29 CCH Tax Ct. Mem. at 275, 277.

[2] Even if this search was unlawful, as petitioner contends, that would not require exclusion in a civil proceeding such as this one of the evidence obtained. See *Kennedy* v. *Coyle*, 352 F. 2d 867, 870 (C.A. 7); compare *Cleary* v. *Bolger*, 371 U.S. 392. The cases petitioner cites as conflicting with the decision below (Pet. 22–29) generally are not in point, since they involved criminal prosecutions or forfeiture of other civil proceedings "quasi-criminal in character * * * to penalize for the commission of an offense against the law." *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700. *Rogers* v. *United States*, 97 F. 2d 691 (C.A. 1), on which petitioner also relies, involved evidence obtained by federal officers under a warrant that had been judicially declared invalid.

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cause.[5] Compare *United States* v. *Harris*, No. 30, O.T. 1970, decided June 28, 1971.

Nor did the search go beyond the description in the warrant. The money was found while the officers were searching the area designated in the warrant, the petitioner's residence from which she sold her liquor and in which she stored her inventory (R. 218a, 263a, 279a–280a). The officers properly opened the footlocker, in which the money was located; it might have contained illicit liquor, such as they had found hidden elsewhere in the house (R. 263a). Given the validity of the discovery of the money, its counting cannot turn the search into one that was constitutionally overbroad. Since petitioner was not on the premises the counting was justified to safeguard against a possible claim that the officers had removed some of the money.

2. There is ample record support for the factual findings concerning the amount of cash petitioner had. The court credited the testimony of the officer who supervised the count of the money over that of petitioner. The court's determination on credibility, an issue for the trier of fact, was not clearly erroneous, and thus it should not be disturbed. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

AUGUST 1971.

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 14 1971
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-68

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**MAGGIE BAILEY,** - - - - - - - - **Petitioner,**

*versus*

**COMMISSIONER OF INTERNAL REVENUE,** - - - - - - - - **Respondent.**

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## REPLY TO RESPONDENT'S MEMORANDUM

---

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WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-68

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MAGGIE BAILEY, - - - - - *Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE, - *Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## REPLY TO RESPONDENT'S MEMORANDUM

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### 1. IS THE INCOME TAX CIVIL FRAUD PENALTY A QUASI-CRIMINAL PENALTY?

The primary question for consideration by this Court is whether or not the income tax civil fraud penalty under the Internal Revenue Code is a quasi-criminal penalty?

In the Tax Court trial below, the petitioner was charged with fraudulent intent to evade taxes for the years 1942 through 1963. The resulting fraud penalties with which the respondent confronted the petitioner totalled $50,952.69 for the years 1942 through 1963 (R. 15a).[1]

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[1]The income taxes and other penalties faced by petitioner were $101,630.40 and $17,808.85, respectively, for the years 1942 through 1963 (R. 15a).

Congress has provided several penalties or sanctions, in the Internal Revenue Code, for the purpose of promoting the orderly and punctual administration of the Federal income tax system. The penalties include both civil and criminal sanctions. Invocation of the criminal does not exclude resort to the civil. *Helvering* v. *Mitchell,* 303 U. S. 391, 82 L. Ed. 917. The most severe of the civil sanctions is that for fraud which is an offense of a serious character, which Congress has designated by the term "fraud with intent to evade tax." The sanction imposed for this offense is that there is added to the tax an amount equal to 50 per cent of the total amount of the deficiency. In one respect the civil fraud penalty is much more severe than the criminal. There is no statute of limitations for civil fraud penalties and the income deficiencies, too, are kept open forever. Whereas, there is a six-year statute for criminal fraud.

With a set of tax fraud facts in his hands, the prosecutor (the Federal government) may choose the criminal penalty route, and if successful the civil penalty also falls on the taxpayer—or the prosecutor may forego the criminal, choose the civil penalty or sanction route to punish the wrongdoer and to warn others. The sole reason he chooses the civil and foregoes the criminal is his belief, from an appraisal of the evidence in hand, that his chances of success are less with the criminal than with the civil. For the main difference between the trial of a civil penalty and that of a criminal penalty is the burden of proof—and the difference there is indeed not too great. In civil, the

government must prove fraud by clear and convincing evidence whereas in criminal it is beyond a reasonable doubt.

The purpose, however, of both criminal and civil penalties is the same as revealed by this Court in the decision of *Dorsheimer* v. *U. S.*, 7 Wall. 1966:

> " 'The purpose of *penalties inflicted upon persons who attempt to defraud the revenue* is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hope of profit.' This definition applies to civil penalties . . . and criminal penalties." (Emphasis supplied.)

The dictionary describes *Quasi-Criminal* as all offenses not crimes or misdemeanors, but which are *in the nature of crimes;* a class of offenses against the public which have not been declared crimes, but *wrongs against the general or local public* which it is proper should be repressed or *punished by forfeitures and penalties.*

## 2. WAS NOT THE SEARCH WARRANT ILLEGAL WHEN ISSUED AND/OR LATER BECAME ILLEGAL AND VOID AS TO PETITIONER?

This Court stated, in the case of *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, as follows:

> "Although an affidavit may be based on hearsay and need not reflect the direct personal observa-

> tions of the affiant . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed . . . was 'credible' or his information 'reliable' . . ."

The affidavit of Trooper Mayberry is void of any "underlying circumstances" from which the magistrate, the County Judge, could conclude that Charles Young was "credible" or his information "reliable" (R. 116a). The County Judge was not called as a witness to testify to the "underlying circumstances," if any, which he received from the informant or the affiant Trooper Mayberry. Too, the affiant Trooper Mayberry was not called as a witness in the Tax Court trial below, although from respondent's Memo (p. 3) it appears Trooper Mayberry did testify where respondent states:

> "Officer Mayberry, on whose affidavit (R. 116a) the warrant was issued, *stated* that his information came from Charles Young, . . ."

Trooper Cromer, the only one of the troopers to testify in the Tax Court, testified that he did not know Charles Young (R. 287a). And, Trooper Mayberry was not garrisoned in Harlan but in Richmond, Kentucky 130 miles away and was imported for the raid (R. 288a). Since he did not testify, the presumption is that he had no personal knowledge of the business operation of petitioner at the premises. Therefore, there were no

"underlying circumstances" revealed by the affidavit or the record. (See *U. S.* v. *Harris,* 91 S. Ct. 2075 (1971).)

Additionally, the testimony of Trooper Cromer disagreed with the affidavit of Trooper Mayberry, which affidavit stated that Charles Young bought the beverages. Trooper Cromer testified, and his official report to state headquarters stated that Trooper Roy Lindsey bought the beverages which resulted in the search warrant (R. 131a, 261a, 288a). Since respondent's claim is that Trooper Cromer's testimony is credible, then the affidavit on which the warrant was issued was clearly false and unreliable, and the County Judge was apparently deceived.

This Court advised in *United States* v. *Ventresca,* 380 U. S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 that the magistrate should not be a rubber stamp for the police—

> "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. * * *"

Therefore a question here for this Court—was not the search warrant issued without probable cause?

Further, the affidavit stated only that the alcoholic beverages were in violation of the Kentucky local option law and did not state that the alcoholic beverages were untaxed and therefore not in violation of any revenue laws (R. 116a). It is therefore presumed that all required taxes were paid by the reputable manu-

facturers of the "Budweiser Beer" and the "Old Haven Hill" whiskey. Now, an examination of the search warrant reveals that it did not authorize a search for alcoholic beverages in violation of the local option law but authorized a search for untaxed "alcoholic beverages" and "stills," obviously moonshine and moonshine stills (R. 114a). Therefore another question here is—where an affidavit is predicated on violation of state local option law and the search warrant is for violation of revenue laws, was there probable cause for the issuance of the search warrant?

Still further, the personal warrant for the petitioner reads, as follows:

> "You are commanded to *search the person of MAGGIE BAILEY* or the automobile or truck, or the house, the outbuildings and adjacent premises *now used by the accused MAGGIE BAILEY,* which is now located in Harlan County, Kentucky . . ." (Emphasis supplied.)

However, the affidavit for the warrant did not state that the purchase of beverages on February 17, 1965 was made personally from petitioner but stated that it was made from her premises (R. 116a). She was not operating the business on February 17, 1965 when the informant (fictional Charles Young?) allegedly made his buy of alcoholic beverages.

Nor was she present when the nine raiders arrived at her sister Maude's and her home on February 18, 1965. (Her sister Maude owned the premises.) Petitioner had not been at home for six weeks and did not

return home until two days after the raid. She was not present to be served or to have her "person" searched. Further, there is no proof anywhere, in the record of this case, that petitioner on February 17 or February 18, 1965 was directly or indirectly using the premises in violation of Kentucky law. To the contrary, there is clear proof that she was not so using the premises, and this is revealed by the, among others, fact that she was never arrested or charged with using the premises on February 18, 1965 for the possession for sale or the sale of alcoholic beverages in violation of Kentucky law.

Assuming *arguendo* a legal search warrant, if the search made by the troopers for beverages on February 18, 1965 were possibly legal, it was legal only against the petitioner's brother Tyree Davidson, who was then operating the business and because the troopers discovered alcoholic beverages in the kitchen when they first entered the house to serve the warrant on the petitioner. The search which resulted that day was therefore for beverages in Tyree Davidson's possession for sale, not petitioner. And, only he was charged and held guilty of a Kentucky law violation.

Therefore the question is—did not the search warrant, if legal when issued, become illegal and void when petitioner was found by the trooper not to be present and not using the premises illegally?

### 3. ASSUMING A VALID SEARCH WARRANT, DID TROOPER CROMER HAVE PROBABLE CAUSE TO BELIEVE THAT A FEDERAL CRIME HAD BEEN COMMITTED?

Assuming *arguendo* that the search was legal for alcoholic beverages, Trooper Cromer had a right to search the footlocker for alcoholic beverages. But, upon finding a large quantity of money in the footlocker and finding no alcoholic beverages, Trooper Cromer then realized and knew that he was legally finished under the search for beverages and that he had no probable cause to seize the money. Otherwise, he would not have telephoned the county attorney to tell him about finding a large quantity of money and requesting advice on seizure. The county attorney, on the basis that there was a lack of probable cause, advised the trooper to leave the money alone. Trooper Cromer's realization of no probable cause was then confirmed. The county attorney obviously realized that this was not the case of a search for alcoholic beverages and the discovery of an item which to own or possess—such as counterfeiting machine or heroin—which is a current, continuing violation of a criminal law committed in the presence of the searching officer.

In spite of the admonition and instruction of the county attorney that Trooper Cromer leave the money alone, Trooper Cromer telephoned the local Federal income tax revenue agent about the money—hopeful for authority from the agent to seize and carry away the money. The agent obviously did tell him that he

could not authorize him to seize and carry the money away—that is, that there was no probable cause. And it is clear that, by asking the revenue agent for authority, Trooper Cromer had abandoned all thought and belief that he had authority under the search warrant. He was no longer relying upon the warrant for seizure.

It is not exactly clear from the record whether or not the revenue agent authorized and deputized Trooper Cromer to seize the money long enough to count it. Either he did or he did not.

It is clear that Trooper Cromer advised the revenue agent that he intended to seize the money and count it, for Trooper Cromer testified that the agent requested to be advised the next day the results of the count (R. 131a, 285a).

It is clear that Trooper Cromer, after his telephone call with the revenue agent, announced to petitioner's brother (Tyree Davidson) that he was going to count the money for the Internal Revenue Service—that he was counting it for the Internal Revenue—and Trooper Cromer repeated this pronouncement (R. 324a, 360a). He did not announce or even pretend that he had authority under the search warrant or that be thought or believed that he had probable cause. For, he was acting under the guise of the Internal Revenue Service.

If the revenue agent did instruct Trooper Cromer to seize and count the money for him, then Trooper Cromer was solely an agent of the revenue agent. The agent would have had no right himself to go to the house and demand possession of the money to count it.

He would have needed a search warrant for the money. Therefore, he had no right to delegate such power.

If the revenue agent did not authorize and deputize Trooper Cromer to seize the money long enough to count it then, when his authority to count the money was questioned by petitioner's brother, Trooper Cromer deceitfully advised him that he was counting the money for the Internal Revenue Service.

Trooper Cromer's mere sight of a large quantity of money was not probable cause to believe that the petitioner was in violation of the criminal section of the Internal Revenue laws. *First,* the mere ownership of a large quantity of legal money or the possession of one's lifetime savings in a footlocker is not illegal under the Internal Revenue laws. *Second,* the amount of the money was unknown. *Third,* how could Trooper Cromer possibly look at the money and have probable cause to know or believe that petitioner had not reported correctly her income? He did not know and could not know the amount of income she had earned and reported in prior years, or how much she had saved from her prior earnings or how much she had inherited or what gifts she had and he did not know any of the vast array of other necessary facts and figures. *Fourth,* how could he possibly look at the money and have probable cause to know or believe that the petitioner had a willful intent to evade income taxes with respect to any of her income tax years?

Probable cause requires an appraisal of the facts and circumstances, a thinking process. There was none of that by Trooper Cromer at this state of the game.

To the contrary, for his own personal vendetta, Trooper Cromer illegally seized the money, searched it and (allegedly) counted it, simply hoping that somehow it would be evidence of a criminal violation of Internal Revenue laws, knowing full well that he had no probable cause.

Even if Trooper Cromer had a suspicion or belief of the commission of a crime, because of seeing the money, were there facts and circumstances within his knowledge to bring about a probable cause? *Nathanson* v. *U. S.*, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159.

The question is did he have probable cause to believe from the facts and circumstances that a crime against the Internal Revenue Service was being committed by the mere ownership of a large quantity of money? (*U. S.* v. *Harris*, 91 S. Ct. 2075 (1971).)

Trooper Cromer made no report of the money to the County Judge who issued the search warrant (R. 127a, 129a, 130a, 292a). The alleged tally which Cromer made of the count was not delivered to the County Judge, nor was it sent to Kentucky state police headquarters as a part of Trooper Cromer's official report of the evidence but obviously the so-called tally went directly to the Internal Revenue Service.[2]

The instant case indeed has the characteristics of the case of *Gouled* v. *United States*, 255 U. S. 298, 65 L. Ed. 647, 41 S. Ct. Rep. 261, *where the obtaining through stealth,* by a representative of the government, from the office of one suspected of defrauding the

[2]The so-called tally was not introduced in evidence as a part of the official report to headquarters (R. 273a, 276a).

government, of a paper which had no pecuniary value in itself, but was only to be used as evidence against its owner, was held by this Court to be a violation of the Fourth Amendment. This Court there said—

> "While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that, under the principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. *The government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.*" (Emphasis supplied.)

Therefore, the question is—do the facts here comply with the Federal standards for probable cause required by this Court in the case of *Carroll* v. *U. S.*, 267 U. S. 132, 162 (1925), as follows:

> "* * * The 'probable cause' required for the issuance of a search warrant, as the very term implies, involves probabilities. Probable cause exists where '*the facts and circumstances within (the officers) knowledge* and of which they have reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' a search should be conducted." (Emphasis supplied.)

Respondent states (p. 4) that "*Since the petitioner was not on the premises,* the counting was justified to safeguard against a possible claim that the officers had removed some of the money." No such hypothetical

justification was testified to by Trooper Cromer, who was the only trooper to testify for respondent.

Petitioner agrees with the logic of respondent when he indicates that, had petitioner been on the premises, her rights would have been violated by the seizure and count of the money. However petitioner can not agree that she loses these rights when the troopers strike at a time when she is absent. The instant case is not different from the case of *Amos* v. *United States,* 255 U. S. 313, 65 L. Ed. 654, 41 Sup. Ct. Rep. 266, in which this Court held that where concealed liquor was found by internal revenue agents, without a search warrant, in the home of the defendant, in his absence, and after a demand made upon his wife to search the premises for violation of the revenue law, the testimony was inadmissible as evidence against the defendant, because acquired by an unreasonable seizure under the Fourth and Fifth Amendments to the Constitution.

**4. WAS THE RECORD DEVOID OF EVIDENTIARY SUPPORT FOR THE ACCURACY OF THE "BILL-BY-BILL" COUNT?**

Petitioner disagrees with respondent's position (p. 4) that there was ample record support for the factual finding that the footlocker held $206,909 on February 18, 1965 and further disagrees that the Tax Court credited Trooper Cromer's testimony over the petitioner's. The Tax Court accepted petitioner's testimony concerning her lack of fraudulent intent, that she had $80,000 in 1944, that she had $100 inventory, and what she said about her living expenses.

The Tax Court had more than her word but Senator Brock and County Clerk Cornett, both of Harlan, testified that petitioner had a good reputation for truth and veracity (R. 143a, 182a). And State Senator Brock, a lawyer, was the county attorney who advised Trooper Cromer to leave the money alone.

The issue is primarily not the credibility of one witness as against another. The petitioner was not present at the alleged count to testify as to whether or not Troopers Lindsey and Mayberry counted "each individual bill." Although it appears highly improbable that Troopers Lindsey and Mayberry counted the money bill by bill. It is not altogether a question of whether Trooper Cromer saw what he saw (credibility), as indicated by respondent. For, petitioner does not dispute Trooper Cromer where he testified that he saw a large quantity of money and that he was present at the alleged count and that he was the tally man. The petitioner does not dispute Trooper Cromer where he testified on cross-examination (R. 297a):

> "Well, it gets tiresome counting one particular way all the time . . ."

And, petitioner does not dispute the credibility of Trooper Cromer when he admitted, on cross-examination (R. 298a):

> "Well, I think you can see the situation. Now, *I can't testify as to what they did.*" (Emphasis supplied.)

He was referring, of course, to Troopers Lindsey and Mayberry, the two (alleged) money counters, who

never did testify in the Tax Court trial. And, particularly, petitioner does not dispute the credibility of Trooper Cromer where he admitted, on cross-examination (R. 299a)—

> "Q. Mr. Cromer, can you swear that Mr. Mayberry was accurate in his count?
>
> A. Not completely accurate, no.
>
> Q. Can you swear Mr. Lindsey was accurate in his count?
>
> A. Not completely, no.
>
> Q. Can you swear the figures given by Mayberry and put down by you were correct?
>
> A. No, sir."

It can be seen, therefore, that the issue is primarily the "accuracy" of Troopers Lindsey and Mayberry, the alleged counters. And as to their accuracy of the count and the correctness of the total, the Tax Court therefore could only *assume* that it was accurate and correct because of the following: (1) Trooper Cromer testified that he could not swear to the accuracy or correctness of the counters; (2) There was no evidence of the expertise of the counters Troopers Lindsey and Mayberry in dealing with large sums of money; and (3) Troopers Lindsey and Mayberry, the so-called counters of the money and the only two who could have sworn to the inaccuracy and/or accuracy of the count, were not produced as witnesses by the respondent. And, the presumption must be from respondent's failure to produce these two key witnesses that their testimony would have been unfavorable to respondent. *Stoumen* v. *Commissioner* (C.A. 3) 208 F. 2d 903.

Without more, the Tax Court's decision can only be seen to erroneously take unwarranted judicial notice of a prodigious native ability of any two Kentucky state troopers to accurately count $206,909 (or $116,300) of assorted and mixed bills of small denominations, in under two hours. And primarily upon this does the government's $206,909 at February 18, 1965 lie. The Court further, with no evidence in the record as to the money gap (between December 31, 1963 and February 18, 1965) estimated that petitioner had $200,000 at December 31, 1963 which was the amount and date involved in the net worth.

## 5. RESPONDENT'S FACTUAL ERRORS.

The respondent erred (p. 2) in omitting the vital, key part of petitioner's objection of Trooper Cromer's testimony about the counting of the money, which omitted part was as follows (R. 267a):

> "Mr. Bagby: Your Honor, I object again to this line of questioning about counting this money. *This trooper went there to search for alcoholic beverages and now he says he is counting money.* I can't see that that was within his right, and *it was against the Constitutional rights of this Petitioner.*" (Emphasis supplied.)

In fact, petitioner objected when the money was first mentioned, as follows[3] (R. 265a):

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[3]See also R. 178a. And, although not before this Court, in the original transcript, petitioner advised in his opening statement that he objected and advised on two other occasions (Original Record; pp. 10, 21).

"Q. During the search was any money found on the premises?

Mr. Bagby: Objection.

The Court: Over-ruled."

Petitioner also objected to the introduction in evidence of the so-called tally of Trooper Cromer (R. 276a).

The respondent errs in stating that the Tax Court held deficiencies of income tax and additions thereto for the years 1945 through 1963 (p. 1). The Commissioner had determined fraud penalties, deficiencies in income taxes and other penalties for the years 1942 through 1963. However, the Tax Court held there was no fraud for any year and further held for the years 1942, 1943, 1944, 1955, 1956 and 1957 that there were no tax deficiencies or penalties and, further, for all the years 1955 through 1963 the Tax Court held no additions to the tax (R. 393a, 394a).

Respondent errs in stating that petitioner kept no records (p. 2). Petitioner used an accountant and kept records for many years, perhaps primitive and incomplete as was her education, and they were produced in the Tax Court but not introduced because the trial was based strictly on net worth, not on her records, and it was useless to burden the Court and record (R. 207, 208a).

## CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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September, 1971